SUPREME COURT, U. S.
FILED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1249

BOARD OF COMMISSIONERS OF
THE CITY OF JACKSON (SCHOOL BOARD)
ETC., ET AL,

Petitioners,

v.

BRENDA K. MONROE, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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October Term 1971

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI

The Petitioners, Board of Commissioners of The City of Jackson, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered January 7, 1972; rehearing denied February 4, 1972 (Appendix B, p. 15).

OPINIONS BELOW

The basic decision involved here is that of the United States Court of Appeals for the Sixth Circuit not yet reported (Appendix A, p. 7). The District Court established and approved a plan for the operation of the City School System which in its opinion meets Constitutional standards. This Court subsequent thereto decided *Swann v. Charlotte-Mecklenburg County, etc.*, 402 U.S. 1, and respondents appealed the District Court decision, relying on *Swann*. The Sixth Circuit remanded the case to the District Court on the basis of its interpretation of the requirements of *Swann*.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USCA Sec. 1254(1).

QUESTIONS PRESENTED

A. Whether the Sixth Circuit has correctly interpreted the intent of this court as set out in *Swann*?

B. Whether *Swann* requires absolute perfection in a racial mixing plan or allows for a rule of reasonableness in determining when a school board has done all that it reasonably could be expected to do in eliminating state imposed (*de jure*) segregation?

C. Whether the School Board of Jackson, Tennessee has complied with such rule of reasonableness?

D. Whether the School System of Jackson, Tennessee is now constitutionally acceptable?

STATEMENT

This case has been in the courts since 1963 and has previously been before this Court, along with two companion cases. This Court on May 27, 1968 struck out a free transfer plan in use by Petitioner. *Monroe v. Board of Commissioners*, 391 U.S. 450.

Since that time the operation of the Jackson schools has been refined further in several hearings but the issue put in question by this petition originates from the last decision of the Sixth Circuit (Appendix A, p. 7) wherein that Court remanded the case to the District Court for further consideration in the light of *Swann*.

Petitioner believes the Sixth Circuit has misconstrued the intent of *Swann* and that the Jackson system meets all Constitutional requirements. This is the thrust of this petition.

REASONS FOR GRANTING THE WRIT

The granting of the writ of certiorari offers this Court an opportunity to (1) identify a constitutionally acceptable school system which formerly operated a de jure segregated system, (2) to refine its decision in the case of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1. (As stated by Mr. Chief Justice Burger in *Winston-Salem, etc. v. Catherine Scott, No. 71-274, October Term*, some misunderstanding seems to exist and this case is the ideal case to eliminate such misunderstanding), and (3) the factual situation upon which to establish a rule of reason for determining whether a system has divested itself of the vestiges of de jure segregation.

Before the Sixth Circuit on cross-appeal was the contention of the petitioner that its school system meets constitu-

tional standards. That is the basic question offered here by petition and involves whether or not the Sixth Circuit has misconstrued the intent of this Court in its decision in *Swann*, an important Federal Question within the meaning of Rule 19(1). There also is a great need for the actual identification of a formerly de jure segregated system which is now constitutionally acceptable.

This Sixth Circuit has based its remand to the District Court solely and alone upon *Swann*.

> "The decision of the Supreme Court in *Swann* delineates guidelines which the Court decrees to be the standards of permissible remedial state action in disestablishing a state imposed system of segregated education, and holds that pairing, non-contiguous zoning, and the use of bus transportation are permissible tools to accomplish desegregation." and also,
>
> "Regardless, however, of these salutary evidences of accomplishment, the *possibility* exists that even greater accomplishment *might* result from a further study of the situation in the light of *Swann*, and of *Robinson* and *Davis*. The cause will therefore be remanded to give the District Court opportunity for such consideration." (Emphasis supplied.)

The Court had already held that the Davis and Robinson cases "are at least arguably distinguishable on their facts from the present case." Therefore the remand is based solely on *Swann*.

The Sixth Circuit succinctly defines the Jackson present situation:

> "To the credit of all concerned, certainly including the District Judge, it is observed that at long last Jackson has made some very substantial progress toward

the desegregation of its school system. For example, we note that although Jackson once maintained a dual school system, as of October, 1971 all of its schools are integrated to some degree; that there is now one high school comprised of 843 white and 643 black students, that there are now three junior high schools integrated in ratios running from 60-40 to 50-50; that four of the nine elementary schools are integrated in ratios similar to those just cited for the junior high schools; but that in the five remaining elementary schools, three are over ninety percent black and two are over ninety percent white. Integration in these five schools is minimal because the location in the City is such that no conceivable zoning change would produce any substantially greater integration." (Footnote 1)

The City of Jackson has no school buses, has never owned or operated school buses in its entire history. The five schools referred to as minimal are separated by great distances as is instantly apparent from a glance at Exhibit Map III in this case (Appendix C, infra). In addition a majority to minority transfer provision is included in the Court-approved plan.

The District Court approved the plan, the Sixth Circuit obviously would have except for *Swann*. What plan de-

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(Footnote 1.) In order to achieve the 60-40 and 50-50 ratio in the Junior High Schools a new school exceeding $2,000,000.00 in cost (Parkway Junior High School), not otherwise required, has been constructed by the City of Jackson.

In order to achieve a merger of the former Negro high school with the former white high school, separated by a quarter of a mile and a major city thoroughfare, the City of Jackson has lowered North Royal Street, constructed an overhead mall and joined the two buildings with a covered walkway. Vast clearing of the campuses and modifications of the two buildings have been 80% completed, all at a cost which will run in excess of one and one-half million dollars.

vised by man is going to eliminate every "possibility" of achieving a little more desegregation? It is not believed this Court requires such perfection.

By any rule of reason the City of Jackson has done all within its power to remove the last vestiges of *state imposed* segregation. Petitioner believes this to be all that this Court means to require and not a removal of every "possibility" that "might" exist. District Judge Robert L. Taylor, Eastern District of Tennessee, has adopted this interpretation in holding the Knoxville School System to be constitutionally acceptable. Unreported March 8, 1972 decision, *Goss v. Board of Education*. The Sixth Circuit has apparently concluded that the enumeration of permissible methods by this Court in *Swann* amounts to an affirmative direction that such methods, or some of them, must be used if a racial balance is not attained in every school in the system, notwithstanding any test of reasonableness or whether *state imposed* or not.

CONCLUSION

The question offered here by this petition will, if decided affirmatively, enable the multitude of de jure segregation cases now monopolizing the dockets to be guided to a rapid conclusion by concrete example, and by a rule of reason with specific application. This is the earnest desire of school boards throughout the affected region and is in the public interest.

Respectfully submitted,

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APPENDIX A

[fol. 1] Nos. 71-1359 and 71-1360

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

BRENDA K. MONROE, ET AL.,
Plaintiffs-Appellants and Cross Appellees,

v.

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, CONSTITUTING THE BOARD OF EDUCATION OR SCHOOL COMMISSIONERS OF SAID CITY, ET AL.,
Defendants-Appellees and Cross-Appellants.

ON APPEAL from the United States District Court for the Western District of Tennessee, Eastern Division.

Decided and Filed January 7, 1972.

Before: PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judges.

PECK, Circuit Judge. This is the third appearance of this case before this Court. The continuing controversy over the desegregation of the public schools of Jackson, Tennessee, originated in 1963 when the plaintiffs, black

students and their parents, filed suit in the District Court for the Western District of Tennessee. In August, 1963, the District Court approved a plan submitted by the Board calling for institution of geographical attendance areas for all schools over a five-year period, but reserving power to the school to "grant or require" student transfers to schools outside their residence zones, upon application or upon the initiative of the school superintendent. 221 F. Supp. 968 (W.D. Tenn. 1963). In September [fol. 2] of 1964, the plaintiffs filed a motion for further relief which challenged the administration of this free transfer provision and which also charged that elementary school attendance zones had been racially gerrymandered. The District Court held that the Board had applied its transfer policy in a discriminatory manner and ordered that free transfers must be allowed without regard to race, and observing further that some of the elementary school zones "appear to be gerrymandered," ordered the boundaries adjusted. 244 F. Supp. 353, 361 (W.D. Tenn. 1965). This Court affirmed except with respect to the District Court's refusal to order faculty integration, which is not here at issue. 380 F.2d 955 (6th Cir. 1967).

A petition for certiorari to the Supreme Court was granted on the issue of whether the school desegregation plan failed to make reasonable provisions to abolish the dual school system, and whether the school board used a standard for assessing the plan which failed to recognize its affirmative duty to disestablish the segregated school system. On May 27, 1968, the Supreme Court reversed that part of the decision of this Court which affirmed the District Court's approval of defendant's geographical school zones with free transfers. The Supreme Court held that a free transfer provision which tends to delay

the conversion from a segregated dual school system to a unitary, nonracial, nondiscriminatory school system is constitutionally impermissible. 391 U.S. 450 (1967).

In August of 1968, the plaintiffs filed a motion for further relief based upon the Supreme Court decisions in this case and in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968). The Board responded by submitting a plan containing the identical geographic zones drawn at the inception of this litigation, and which contained a free transfer provision, despite the fact that the Supreme Court decision had held invalid the use of free transfers in the Jackson City school system. On May 28, 1969, the District Court ordered the elimination of the free transfer provision, and ordered the re-
[fol. 3] vision of school zones to accomplish greater desegregation.

Following entry of that order, the Board requested a stay with respect to the elimination of the free transfer provision and the revision of the zones. The Court granted the motion with respect to the zones, but refused to stay the elimination of the free transfer provision. On June 19, 1970, the order of the District Court was affirmed by this Court. 427 F.2d 1005 (6th Cir. 1970).

One month later, the school board sought approval of an amended plan of desegregation for the 1970-71 school year which retained the identical zones which the District Court had ordered altered. The Board submitted alternative geographic zones for the junior and senior high schools, but no alternative zones for the elementary grades were provided. On July 30, 1970, the District Court approved the alternative zones for the 1970-71 school year, and directed the Board to seek the assistance of the Title IV Educational Opportunities Planning Center of the Uni-

versity of Tennessee in revising the elementary zones so as to promote further desegregation.

On December 15, 1970, the Title IV Center filed its recommendations. It concluded that geographic factors and residential housing patterns were such that no other zoning pattern "would be likely" to significantly alter the existing racial imbalance, adding that the District Court approved zones "are the best that can be drawn for the system." Nevertheless, it proposed some adjustments or alterations in the existing zones which admittedly differed very little from those then in use. The report then suggested two further alternative plans: (1) noncontiguous zoning might be utilized if school supported transportation could be instituted, or (2) adjacent schools might be paired and the boundary zones enlarged to encompass the new area. Several pairings were suggested, any of which would result in greater integration than is possible with the present method of zoning.

[fol. 4] After consideration of the Center's alternatives, and after hearing the plaintiffs' request that the pairing alternative be adopted, the District Court ordered that the proposed zone changes be adopted. Those zone changes have been effectuated by the Board, and on this appeal no complaint is made as to that aspect of the decision. It is the Board's position that because those zone changes eliminated the last of Jackson's totally all-black schools, the system has been brought into compliance with Constitutional standards.

The plaintiffs contend that the District Court was obligated to adopt either the pairing or the non-contiguous zoning proposal of the Title IV Center because these alternative plans provided for greater desegregation than the zones adopted by the Court, and contend that the Board

can meet its affirmative Constitutional duty only by utilization of the plan which more effectively than any other accomplishes desegregation. This contention is based upon the opinion of the Supreme Court of the United States in *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1970), which was announced after the District Court's opinion in this case was filed, and upon two recent decisions from this court: *Robinson v. Shelby County Board of Education*, 442 F.2d 255 (6th Cir. 1971), and *Davis v. School District of Pontiac*, 443 F.2d 573 (6th Cir. 1971).

The decision of the Supreme Court in *Swann* delineates guidelines which the Court decrees to be the standards of permissible remedial state action in disestablishing a state imposed system of segregated education, and holds that pairing, non-contiguous zoning, and the use of bus transportation are permissible tools to accomplish desegregation.

The plaintiffs rely upon the *Davis* and *Robinson* cases, *supra*, as holding that alternative plans providing for greater desegregation must be adopted in preference to less effective plans in order for a board to meet its affirmative Constitutional duty. Suffice it to here observe only that those cases are at least arguably distinguishable on their facts from the present case.

[fol. 5] To the credit of all concerned, certainly including the District Judge, it is observed that at long last Jackson has made some very substantial progress toward the desegregation of its school system. For example, we note that although Jackson once maintained a dual school system, as of October, 1971, all of its schools are integrated to some degree; that there is now one high school comprised of 843 white

and 643 black students; that there are now three junior high schools integrated in ratios running from 60-40 to 50-50; that four of the nine elementary schools are integrated in ratios similar to those just cited for the junior high schools; but that in the five remaining elementary schools, three are over 90% black and two are over 90% white. Integration in these five schools is minimal because the location in the city is such that no conceivable zoning change would produce any substantially greater integration.

Regardless, however, of these salutary evidences of accomplishment, the possibility exists that even greater accomplishment might result from a further study of the situation in the light of *Swann*, and of *Robinson* and *Davis*. The cause will therefore be remanded to give the District Court opportunity for such consideration.

The plaintiffs have also appealed from the District Court's award of $5,000.00 attorney fees, contending that the award was too limited, both in amount and in the period for which the award was made. The defendant has cross-appealed, arguing that no award of counsel fees should have been made against them because they have not been "defiant, obstinate or unreasonably obdurate," that they have acted in good faith in complying with the orders of the Court, and that only once have they taken an appeal from the order of the District Court.

The plaintiffs are correct in asserting that counsel fees have traditionally been allowed to a prevailing party within the court's discretion in equity cases where such allowance has been necessary to provide full relief to the prevailing party. *Mills v. Electric Auto-Lite Co.*, 396 [fol. 6] U.S. 375, 392 (1970). Counsel fees have been awarded in numerous civil rights cases: *Lee*

v. Southern Home Sites Corp., 429 F.2d 290 (6th Cir. 1970), *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967), *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (4th Cir. 1951), *Dyer v. Love*, 307 F. Supp. 974, 984-88 (N.D. Miss. 1969), and in numerous school desegregation cases,[1] *e.g.*: *Cato v. Parham*, 403 F.2d 12, 16 (8th Cir. 1968), *Rolfe v. County Board of Education*, 391 F.2d 77, 81 (6th Cir. 1968), *Bradley v. School Board*, 345 F.2d 310, 321 (4th Cir. 1963), *Bell v. School Board of Powhatan*, 321 F.2d 494, 500 (4th Cir. 1963), *Pettaway v. County School Board*, 230 F. Supp. 480, 487 (E.D. Va. 1964); an award of over $40,000.00 was made in the most recent phase of the Richmond, Virginia case: *Bradley v. School Board of Richmond, Virginia*, ... F. Supp. ... (E.D. Va. 1971) (No. 3353-R, May 26, 1971.)

The leading decision in this area appears to be *Bradley v. School Board of Richmond, Virginia*, 345 F.2d 310 (4th Cir. 1965), in which it was stated that an award of attorney fees is proper only in the extraordinary desegregation case, and only when it is found that bringing the action should have been unnecessary and was compelled by the school

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[1] Some statutory schemes make provision for or even compel the award of attorney fees for the prevailing party. While the Civil Rights Act of 1964 provides for attorney fees in several places, (e.g.: cases filed to redress discrimination in public accommodations actions, 42 U.S.C. § 2000(b)) the section relating to public education, 42 U.S.C. § 2000(c), does not. The Civil Rights Statute under which this suit was brought, 42 U.S.C. § 1983, does not provide for counsel fees, but does create liability ". . . in an action at law, suit in equity, or other proper proceeding for redress." This statute therefore neither creates nor changes any rights with respect to attorney fees, apart from prevailing equitable principles. (See also 28 U.S.C. § 1343(4) which confers jurisdiction upon the District Courts over any civil action ". . . to secure equitable or other relief . . .") Such awards, therefore, are within and are a part of the historic equity jurisdiction of the Federal Court. **Sprague v. Ticonic National Bank**, 307 U.S. 161, (1939).

board's unreasonable, obdurate obstinacy. (345 F.2d at 321). The plaintiffs contend that the award should not have been limited as it was to the period of the time from the remand from the Supreme Court to the time of the issuance of this Court's most recent ruling in June, 1970.

[fol. 7] In determining whether this Board's conduct was, as found by the District Court, unduly obstinate, we must consider the state of the law as it then existed. Prior to the decision of the Supreme Court in this case in 1968, the defendant had been operating the Jackson school system for several years with a free transfer provision which had been approved by the District Court and by this Court. This plan was not impermissible under the then generally accepted view of what duty was placed upon school boards to disestablish state-imposed segregation. See *Robinson v. Shelby County Board of Education*, 311 F. Supp. 97, 102 (W.D. Tenn. 1970), *Briggs v. Elliott*, 132 F. Supp. 776 (E.D. S.C. 1955), *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963), *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966). Thus we conclude the determination as to a lack of unreasonable obstinacy as to this earlier period to have been proper. However, we cannot say that the District Court's characterization of the Board's conduct after 1968 was clearly erroneous, and therefore will not disturb its conclusion that the Board's conduct during that subsequent period warrants the award of attorney fees. The Supreme Court had stated very clearly that free transfers in the Jackson school system were unconstitutional, and yet the Board resubmitted to the District Court a plan containing a free transfer provision, and then appealed the District Court's denial of that plan to this Court. As noted in the *Bradley* case, the question of whether the defendant has been guilty of unreasonable,

obdurate obstinacy is for the district judge to determine. He has a wide discretion in this regard, and we find no abuse of this discretion either in his order for attorney fees, or in the determination of the amount thereof.

So much of the order of the District Court as provides for the allowance of attorney fees is affirmed, and the cause is otherwise remanded for further proceedings consistent herewith.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRENDA K. MONROE, ET AL.
Plaintiffs-Appellants
and Cross Appellees

v.

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, CONSTITUTING THE BOARD OF EDUCATION OR SCHOOL COMMISSIONERS OF SAID CITY, ET AL.
Defendants-Appellees
and Cross-Appellants

NOS. 71-1359 and 71-1360

Appendix B

ORDER

(Filed February 4, 1972)

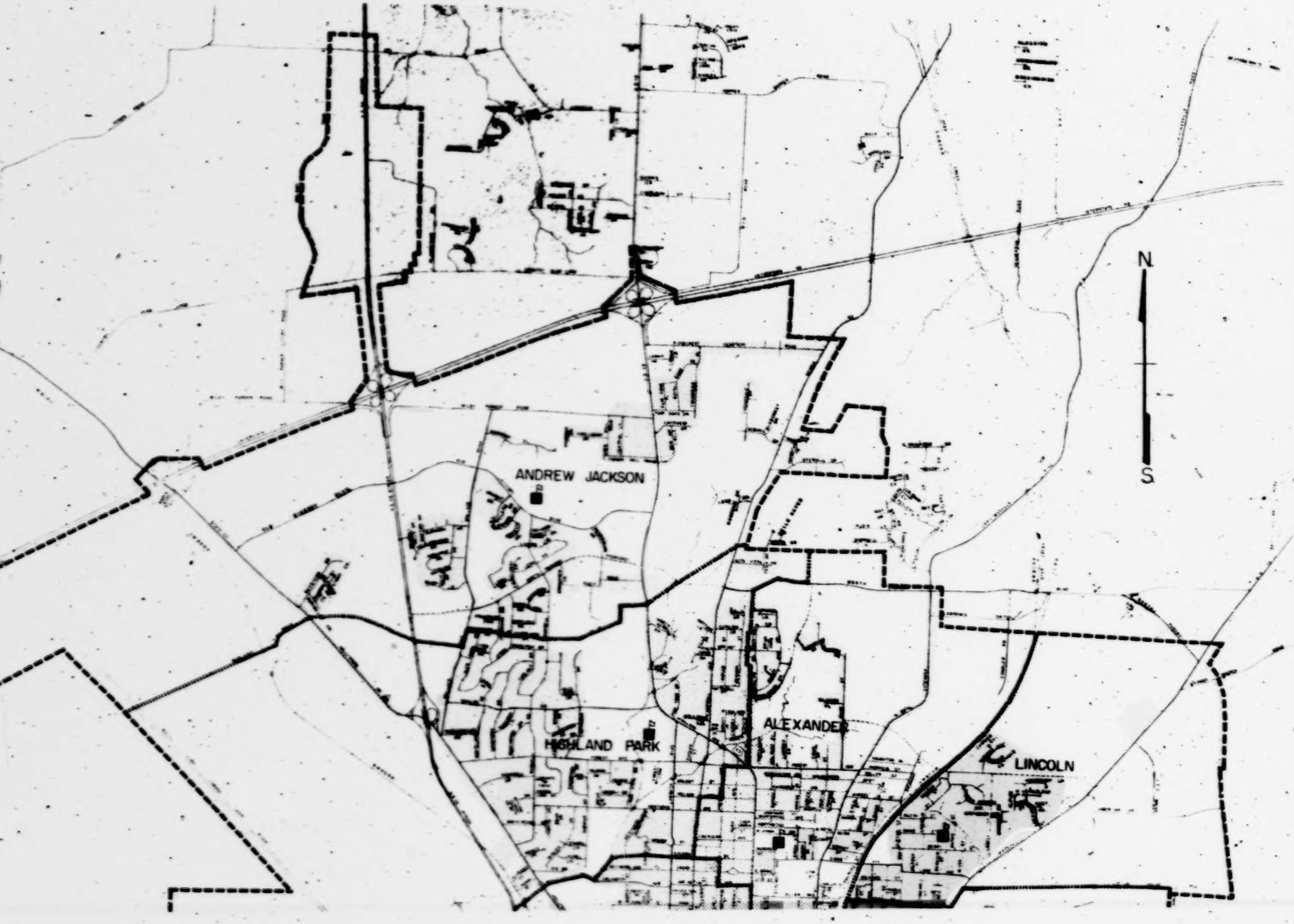
Before PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judges.

Both parties having filed petitions for rehearing with this Court, and this Court having considered said petitions and being duly advised in the premises,

IT IS ORDERED that the petitions for rehearing be, and they are, hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins
Clerk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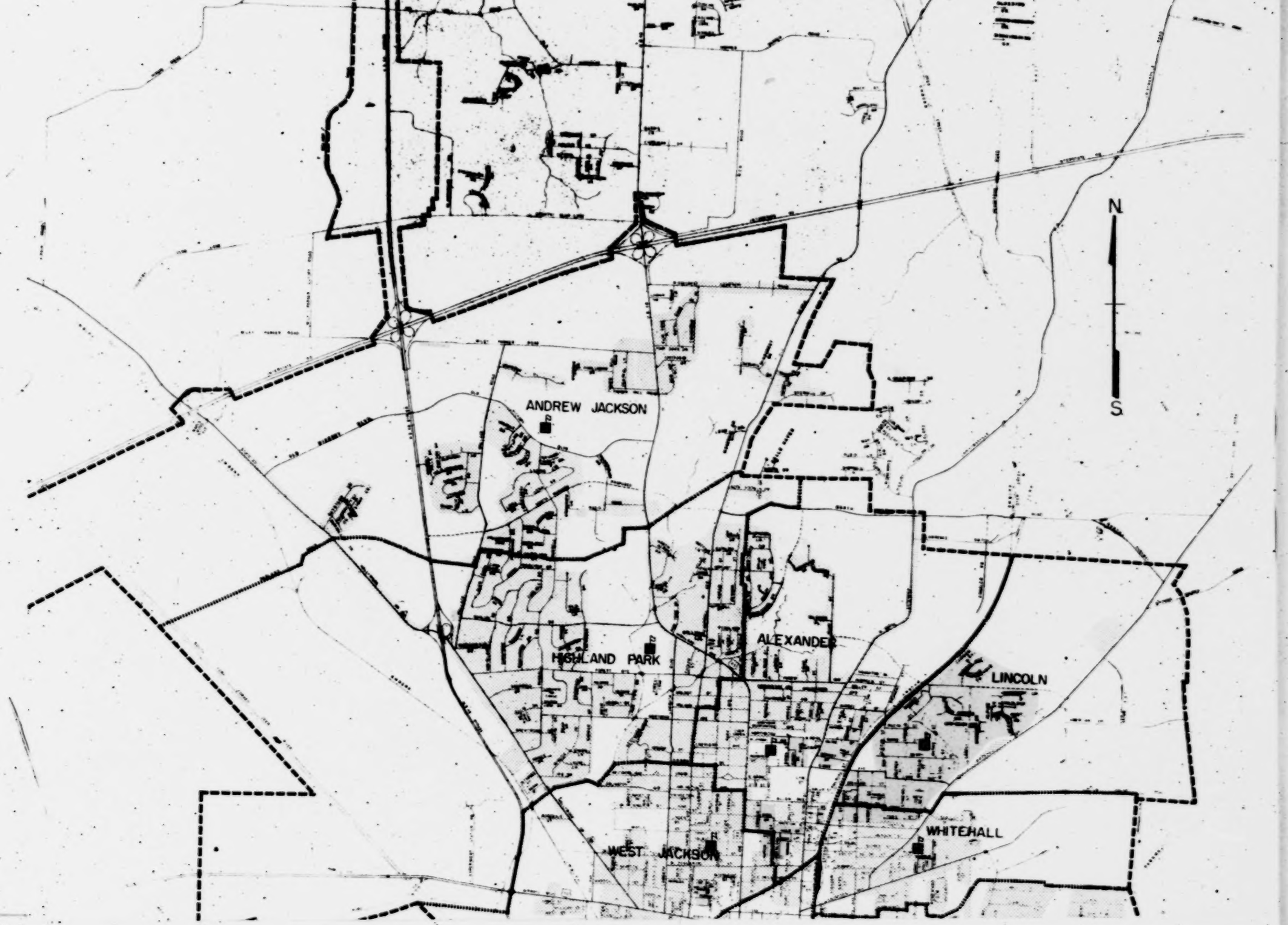
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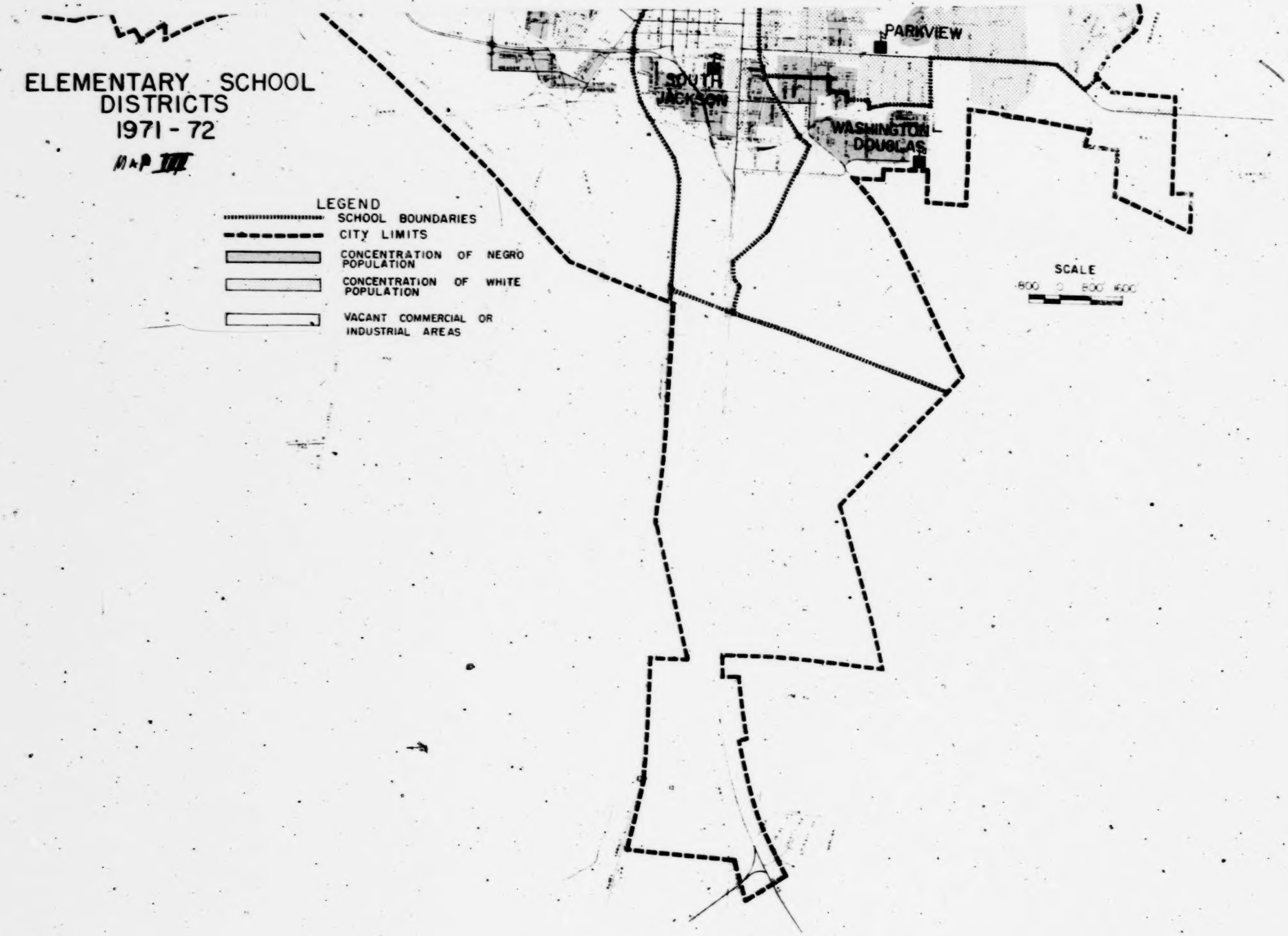
ELEMENTARY SCHOOL DISTRICTS 1971 - 72

MAP III



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AMENDMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner here amends its Petition for the Writ of Certiorari heretofore filed in this cause by adding to Footnote 1 at page 5 the following paragraph:

"The five elementary schools referred to as minimal are Washington-Douglas, Lincoln, South Jackson, Highland Park, and Andrew Jackson."

Respectfully submitted,

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Of Counsel.